CORRECTED COPY

Supreme Court, U.S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 79-193

PAUL LIVINGSTON and SARA LIVINGSTON,
Petitioners,

v.

GEORGE EWING, individually and as Director of the Museum of New Mexico; TIBO CHAVEZ, MRS. WALTER MAYER, NORRIS E. BRADBURY, FATHER BENEDICT QUESTA, LINDA DELGADO, FRANK BATEMAN, and TONY REYNA, all individually and as members of the Board of Regents of the Museum of Santa Fe; SAM PICK, Individually and as Mayor of the City of Santa Fe; and RUDY MILLER, individually and as Chief of Police of the City of Santa Fe; and JOSEPH ALLOCCA, DORA BATTLE, BOB BERNARDINELLI, JIM A. CORIZ, JR., EDWARD GONZALEZ, LOUIS MONTANO, MICHAEL RUNNELS and ROBERT STUART, individually and as Council Members of the City of Santa Fe, DENNIS ANDERSON, ALFRED TOFOYA, and CARNATION ATENCIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EMANUEL REDFIELD
67 Wall Street
New York, New York 10005
Counsel for Petitioners

August 1, 1979.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	11
1. The Decision Below Conflicts with this Court's Decision in *Morton v. Mancari,* and Section 2000e-2(i) of Title 42 U.S.C. is not Applicable or Properly a Part of this Case	11
2. The Decision Below Involves an Important and Novel Question of Freedom of Expression which The Court of Appeals Failed to Consider Although Passed Upon by District Court and Argued in Court of Appeals	15
3. The Decision Below is Inconsistent with this Court's Decisions Under the Equal Protection Clause in that it Held that the Museum's Policy, Although Admitted to be a Racial Discrimination, was not Subject to Strict Scrutiny, Because Petitioners Were "White" and Therefore not of a Stigmatized Minority	16
Conclusion	18

Appendix A (Opinion and Judgment of Court of Appeals) 1a

Appendix B (Opinion and Judgment of District Court). 13a

Appendix C—Title 42 United States Code Sec. 2000(e)-2(i) 26a

Appendix D—Resolution Board of Regents of Museum 26a

Appendix E—Policy of Museum on Sales..... 27a

Appendix F—Resolution [Ordinance] of Santa Fe..... 29a

CITATIONS

Cases:

Linmark Associates, etc., v. Township, etc., 431 U.S. 85 16

Morton v. Mancari, 417 U.S. 535..... 11,15

Niemotko v. Maryland, 340 U.S. 268..... 16

Regents, etc. v. Bakke, 57 L. Ed. 2d 750..... 14

Strauder v. West Virginia, 100 U.S. 303..... 14

United Steelworkers of America, —U.S.— 78-432 6/27/79 15

Yick Wo v. Hopkins, 118 U.S. 356..... 12

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

PAUL LIVINGSTON and SARA LIVINGSTON,
Petitioners,

v.

GEORGE EWING, individually and as Director of the Museum of New Mexico; TIBO CHAVEZ, MRS. WALTER MAYER, NORRIS E. BRADBURY, FATHER BENEDICT QUESTA, LINDA DELGADO, FRANK BATEMAN, and TONY REYNA, all individually and as members of the Board of Regents of the Museum of Santa Fe; SAM PICK, individually and as Mayor of the City of Santa Fe; and RUDY MILLER, individually and as Chief of Police of the City of Santa Fe; and JOSEPH ALLOCCA, DORA BATTLE, BOB BERARDINELLI, JIM A. CORIZ, JR., EDWARD GONZALEZ, LOUIS MONTANO, MICHAEL RUNNELS and ROBERT STUART, individually and as Council Members of the City of Santa Fe, DENNIS ANDERSON, ALFRED TOFOYA, and CARNATION ATENCIO,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Paul Livingston and Sara Livingston, respectfully, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this action on June 14, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The District Court for the District of New Mexico wrote an opinion which is reported in 455 F. Supp. 825 and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 14, 1979 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May the State of New Mexico, consistent with the Equal Protection Clause of the Fourteenth Amendment grant a preference in the use of its public property to Indians for sales to the public, solely because they are Indians?

2. May the State of New Mexico, consistent with the Equal Protection Clause grant such use of public property to Indians exclusively, on the ground that Indians are said to be unique?

3. May white persons be excluded from such use of public property because the use of such property has been granted to Indians exclusively?

4. Are white persons barred from asserting a denial of equal protection under the Fourteenth Amendment because they, as white persons, they cannot show discrimination against white persons carries a "stigma" or is "invidious"?

5. May the discrimination against petitioners but in favor of Indian persons in violation of the Fourteenth Amendment be excused or cloaked by calling the discrimination one of "culture" instead of race?

6. Is the intended sale by petitioners of their wares on public property protected by the First Amendment as incorporated in the Fourteenth Amendment as a form of expression and assembly?

7. Has the Museum abridged the petitioners' right of free speech under the Fourteenth Amendment by denying the use of the public property for the exercise of that right in the sale of their wares while granting that right to other persons on the basis of race?

8. May preferences in the use of a public facility, such as a place for the expression of ideas in selling wares be granted to a particular race, such as the Indians in this case, to the exclusion of persons of another race, such as the white persons in this case?

9. Did the Court of Appeals deny due process of law to petitioners by injecting as support for its judgment, the preference to Indians statute, 42 U.S.C. Section 2000e-2(i), the statute which applies to employment, although the District Court had denied the application of the intervenors to amend

their answer to allege that statute as a defense on the ground that the statute was irrelevant to the issues?

10. Did the Court of Appeals correctly hold that 42 U.S.C. Section 2000e-2(i), an equal employment statute, was applicable to this case which involves only the grant of use of public property for sales of wares?

11. Did the Court of Appeals err in holding that 42 U.S.C. Section 2000e-2(i) applies to this case, although the respondent Museum not only granted a preference to Indians, but also excluded petitioners because they were white persons?

12. Is 42 U.S.C. Section 2000e-2(i) as applied by the Court of Appeals a denial of the Equal Protection Clause of the Fourteenth Amendment?

13. Whether a scrutiny of the facts should have been made by the courts below and whether such scrutiny would have yielded the conclusions that an outright preference in the grant of the use of public property was made here to one race to the exclusion of persons of other races in violation of the Equal Protection Clause and of the First Amendment?

14. Whether intervention was improvidently granted as of right to Indians who had no legal interest in the issues, but only a general public interest, and who did not demonstrate that the Attorney General of New Mexico could not adequately defend this lawsuit?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment.

2. First Amendment.

3. United States Code, Title 42, Section 2000-e-2(i) (App. C).

4. Resolutions of the Board of Directors of the Museum of the State of New Mexico. (App. D)

5. Policy on Sales on Museum Grounds. (App. E)

6. Resolution No. 1975-23 of the City of Santa Fe. (App. F)

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in District Court

The jurisdiction of the District Court was invoked under 42 U.S.C. Section 1983, 1985 and 28 U.S.C. 1343, (civil action against deprivation or interference with civil rights).

The judgment in this case arises from a motion for summary judgment. The facts not in issue arise from the pleadings, the Pretrial Order of the District Court, the adversary depositions, and the concession by the Attorney General in his motion for summary judgment in favor of the respondent Museum.

The petitioners are husband and wife. They handcraft jewelry at home, which they sell directly to the public. They regard their craft as a form of self-expression and the sales as a source of livelihood for themselves and their child.

The Museum of State of New Mexico is a state owned museum of fine art. It was established by the laws of 1909, Chapter 74 of New Mexico.

It is a general museum of fine arts. It is not an Indian museum. It is a general museum in the same sense that the National Gallery in Washington, D. C., or the Metropolitan Museum of Art are general museums of fine arts.

One of the buildings of the Museum is the Palace of the Governors which was built by the Spanish governors of the territory in 1610 and was used by them for offices and living quarters. Later it was used by the Mexican Republic and by the United States for similar purposes. It was also used as a stronghold for defense against Indians.

This Palace is so constructed that it has a portico on one side called the Portal. It consists of a space covered by a roof which is a part of the Palace and which is supported by columns.

Since at least 1935, some Indians found it an attractive spot for the display and sale of their wares. Whether the wares were all made by the Indians who sold them, would be a difficult task to prove conclusively, even by those who may assert the affirmative.

In 1972, at a meeting of the Board of Regents of the Museum, the question arose about requests for permission to use the Portal for sales. This came about because some Pueblo Indians came to the Regents to learn who was entitled to use the Portal. At a meeting of the Regents on February 18, 1976, the policy was more formalized by Resolution (App. D) hereto and by a subsequent policy statement issued by the Museum, Appendix E.

Nothing in the policy requires that the Indians be a New Mexican Indian. The Resolution required that the crafts be produced by hand by Indians, but it does not require that the wares

be produced by the Indian who was selling them. As we stated above, proof of such activity would be an impossible task. Crafts made in Maine could vie with crafts made by New Mexicans not present at the Portal. Likewise, Indians, residing in Maine, Oklahoma or North Carolina have an equal right under the Resolution (Ewing Deposition, Supp. II).

Since the adoption of the Resolution in 1976, the plaintiffs attempted to sell their handcrafts at the Portal, but have been forbidden and frustrated by the Resolution and policy and by the Santa Fe ordinance, Appendix F hereto.

The complaint in substance alleged the foregoing and in addition alleged that the petitioners in January 1976 requested Ewing for permission to sell their jewelry at the Portal. Permission was refused because they were not Indians. They were threatened with arrest if they sold there. The complaint also alleged that only Indians were permitted to sell at the Portal and that the policy of the Museum was discriminatory against petitioners because of their race in violation of the Equal Protection Clause and of Sections 1983 and 1985 of Title 42 U.S.C.

The deposition of respondent director Ewing reveals that the policy was adopted to afford Indians an opportunity to sell their wares on the public grounds, and to earn money doing so. Nothing was testified by him to the effect that the Indians were an exhibition or a form of culture. The latter were injected as excuses to justify an admitted discrimination based on races. It is a new technique introduced by the Attorney General to make racial discrimination palatable (Supp. II).

Since Ewing was the director of the Museum, his adversary testimony in this summary judgment becomes notable:

He testified (Supp. II pp. 6-20):

Q. When was the policy of the sales under the Portal discussed next at a board of regents meeting?

A. That would have been at the 1976. Yes, this is February 18, 1976.

Q. Do you have copies of those minutes with you?

A. Yes, here.

Q. Thank you. Do I correctly understand that it was at this meeting that the present Museum policy on sales under the Portal was adopted?

A. That's correct.

Q. I show you a copy of what purports to be the Museum's policy on sales on Museum grounds, which is attached to the complainants' Exhibit A and purports to bear your signature. I ask you whether you recognize that document and that signature?

A. Yes. This is a document prepared under my direction, signature is mine, date is February 24, 1976.

Q. Would you describe it Mr. Ewing?

A. It is the policy adopted by the board of regents of the Museum of New Mexico, pertaining to sales on Museum property and it was adopted on February 18, 1976.

Q. Do you recall whether that was the nature of the discussion had by the members of the board of directors, with respect to this resolution?

A. Yes. There was discussion, quite naturally on it, and I think the purpose of this was to reaffirm the policy that already existed to clarify it and to make sure that there was no ambiguity and it dealt specifically with the Museum—the Palace Portal, but also at that point other property had come into consideration. So they wanted to make it very clear.

Q. Do you recall whether there was substantial discussion at that meeting, Mr. Ewing, as to the possibility of permitting non-Indian vendors the use of space under the Portal?

A. I don't recall any discussion as to the possibility of permitting other vendors.

Q. I take it then that the policy which is presently enforced, with respect to the sales under the Portal, is that which appears on Exhibit A to the complaint. This policy of sales on Museum grounds, is that correct?

A. Yes, that would be correct.

Q. Do you notice that the policy requires that the person be a New Mexico Indian?

A. No, it does not.

Q. And what sorts of arts and crafts may be sold by Indian persons under the Portal?

A. It states specifically to sell arts and crafts produced by hand by Indian artists and craftsmen.

Q. Do you find in that paragraph a requirement that the Indian arts and crafts in question be produced by hand by New Mexico Indians?

A. No.

Q. Does the Museum keep a list of the names and addresses of persons who sell crafts under the Portal?

A. No.

Q. Are you aware of the names and addresses of persons who sell crafts under the Portal?

A. No, I am not.

Q. Can you tell me what an Indian person has to do in order to obtain the privilege of selling arts and crafts under the Portal?

A. Arrive.

Q. Arrive?

A. Yes. We place no restriction. We are not in the business of operating a market. That space is available for Indians and as long as the requirements of the policy are met, they are free to use that space.

By Ewing's Counsel

Q. Finally, with respect to the Indians and knowing them, have some of the Indians been coming there for quite sometime?

A. Yes. Some of them have been coming all of their adult life and back well, into their childhood.

Q. So your familiarity with the Indians has been more because of the fact that you have seen them there for so many years and their families for so many years rather than a formal relationship with the Museum?

A. That is correct. Yes.

Q. I mean someone you would see every single morning as you went in *rather than the fact that these people are somehow contractually or whatever* related to the Museum? (emphasis added)

A. Yes.

It will be noted that Ewing refers to the Indians as "selling," as "merchants" and "vendors." Nowhere did he adopt the position that Indians (any Indian) who appeared to sell their merchandise were a part of a "portal policy," words which were seized upon to justify this outright and admitted racial discrimination.

Even the resolution adopted by the board of regents of the Museum referred to by Ewing in his deposition (Appendix F) shows that the intent was to prefer Indians in the use of the property for sales and its reliance, albeit erroneously, was upon the Civil Rights Act as authority to *exclude* other persons because of their race. It reads:

"Whereas, the Civil Rights Acts of 1964 and 1972, enacted by the Congress of the United States and upheld by the Supreme Court of the United States have clearly re-enforced the policy of preferential treatment for Indians employed in Indian-related industries on or near Indian reservations."

Had the courts below applied strict scrutiny to the facts in this case—as it should have since the Attorney General in his brief in the Court of Appeals admitted that there was a discrimination based on race—they would readily have exposed the attempt to cloak the discrimination by the new technique of calling it "portal policy." The testimony of Ewing made it crystal clear that the policy was solely for the purpose of preferring Indians as a race and what is worse, *excluding* all other persons because of their race.

Because of the Museum's policy and its threat to have petitioners prosecuted for violation of the policy, petitioners commenced an action on April 8, 1977 in the District Court for the District of New Mexico. The petitioners sought a declaration, injunction and damages (they subsequently waived damages) on the ground that their constitutional rights were impaired under the Equal Protection Clause. Depositions were taken and a Pretrial Order was entered on October 18, 1977. On May 5, 1978, an order granting intervention over the objections of petitioners was entered in favor of Dennis Anderson, Alfred R. Tafoya and Carnation Atencio. These individuals are Indians who stated they appear at the Portal to sell their wares.

The petitioners moved for summary judgment in their favor, and the Museum cross-moved for summary judgment in its favor. The District Court granted judgment to the Museum dismissing the complaint. The Court of Appeals affirmed the judgment in accordance with the opinion appended to this petition.

REASONS FOR GRANTING THE WRIT

This case brings up for review several important questions of federal law and recurring problems which should be settled. The decision below also decided the federal questions in conflict with the applicable decision of this Court.

1. The decision below conflicts with the version of this Court in *Morton v. Mancari* 417 U.S. 535. The Court of Appeals constructed its judgment on *Mancari,** and held that because this Court in that case approved a preference to Indians, then the preference granted here is supported by that case. That version is incorrect for these reasons:

---

*"In conclusion therefore, we hold that the Livingstons' case fails because Congress was fully justified in extending to the Indians ... exemptions that are considered and favorably discussed in *Morton v. Mancari, supra,* opinion 12A post, last sentence.

(a) In this case there was not only a preference to Indians, but an absolute *exclusion* of other persons based on race. Thus, *Yick Wo v. Hopkins*, 118 U.S. 356 is the case that applies.

(b) *Morton* was a case of a preference to Indians in employment in the Bureau of Indian Affairs. It rested on a design to further the cause of Indian self-government. But here, there is no question about Indian self-government. Here there is only a question of permitting a group of persons based on race to exclusively use public property for purposes of selling handcraft jewelry and wares. There was no employment involved. It was clearly and solely the grant of permission to use public property. The use would not have been an employment practice any more than if the Indians had been granted the right to speak at the Portal in the public plaza, to the exclusion of all persons of a different race. We refer to the deposition of the Museum's director (*supra*, p. 9) in which he states that any Indian from any place could come and go as he wished. All he had to do was "arrive" and make his sales. There was no "contract" between the Museum and any Indian. According to Ewing, the Museum kept no record of the names and addresses of the Indians who sold. And Ewing, if pressed, would most probably have stated that the Museum does not pay any Social Security taxes, unemployment taxes, carry liability insurance, provide workmen's compensation insurance, withhold taxes, or in any way act as an employer does toward an employee or to control him. Ewing summed it up when he said that any Indian can just arrive and set up his display. This would apply even to any Indian from any State. Nor did the Museum require the Indian to live on a reservation or near one.

The Court of Appeals thought the presence of the Indians attract persons to the public buildings and therefore the Indians are employees. Aside from the fact that tourists who visit the buildings may, on the contrary, be attracted to buy from the Indians or any other vendors not vice-versa, such powers of attraction do not create an employment arrangement, absent a contract. Any other persons, be they Irish, Italians, blacks or Chinese, who are given permission to sell on public property would, in the view of the court below, be deemed an employee of the building adjoining the scene of selling operations. This case is simply a grant of permission to Indians to use the public space for the sale of their wares.

Even if by the furthest stretch of the imagination could the Indians be deemed employees of the Museums, there is no fulfillment of the requirement that they be living on or near a reservation. Ewing's testimony above showed that any Indian could use the place. The Indian need not be a New Mexican. Nor need he be one living on a reservation or near one. This would include Indians living in apartments in metropolitan cities. No record is kept by the Museum, according to Ewing, of the names and addresses of the Indians. Indeed, the record does not show which Indians live on reservations or near them, evidently because there is no employment arrangement in this case that would bring Section 2000e-2(i) into application.

The situation in this case can be aptly applied to an exclusionary preference to any race as can be imagined from the following:

Suppose a municipality owned a baseball stadium around whose grounds some neighboring persons of Irish descent would customarily linger. Then some time around 1935 those persons decided to whittle away at wood to make baseball bats and which later expanded into the making of gloves and other baseball equipment. Those persons would collect sightseers who witnessed their craft on the grounds of the stadium and enjoyed the "cultural" aspects of the craft of the Irish who were in baseball from its early beginnings 100 years ago. The enjoyment of the "cultural" aspect was even enhanced by some of the

craftsmen even appearing in ancient Gaelic costume and conversing in Gaelic during their sessions.

About 1976 after there had been a population change, some non-Irish wanted to set up shop on the stadium grounds to sell similar wares. But the competition was resented. The stadium thereupon adopted a policy that only persons of Irish descent could use the stadium grounds for the sale of their hand-made baseball equipment because the Irish had been identified with baseball since its origin, that the public has enjoyed watching them at work selling their wares, with the incidental "cultural" benefit derived from it. Moreover, those craftsmen were poor and might go on welfare relief if deprived of the stadium grounds. Indeed, their forebears had for 400 years suffered oppression in Ireland, and when they migrated to the United States they were subjected to offensive indignities of prejudice for their ethnicity and culture, as well as for their religion (cf. Justice Strong in *Strauder v. West Virginia,* 100 U.S. 303 at 308: "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment").

If "whites" were substituted for "Irish" in the foregoing parable, that only whites could use the stadium grounds for the sale of baseball paraphernalia (they were the earliest developers of baseball), the rush of the judiciary to condemn the discrimination would have been breathtaking. And justifiably so.

(c) The Court of Appeals incorrectly applied *Morton* as authority for the proposition that Indians are unique in law and therefore, *any* preference to Indians, even to the exclusion of all others, is a valid exercise of State power. But this Court in distinct languge in the *Morton* opinion held that it was strictly limited to the unusual facts in that case. Moreover, in ***Regents etc., v. Bakke,*** 57 L.Ed 2d 750, it was stated in footnote 42 p. 780 as follows:

"42. Petitioner also cites our decision in Morton v. Mancari, 417 U S 535 41 L Ed 2d 290, 94 S Ct 2474 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is sui generis, Id. at 554, 41 L Ed 2d 290, 94 S Ct 2474. Indeed, we found that the preference was not racial at all, but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups (,) . . . whose lives are governed by the BIA in a unique fashion.' Ibid."

(d) Nor does the recent decision of *United Steelworkers of America v. Weber* —U.S.— (June 27, 1979) have any application. That case clearly involved an employment. This case, with all due respect to the Court of Appeals, clearly does not involve an employment practice. Moreover, that case involved a voluntary practice adopted by a private employer. And most important, that case involved a preference. It did not provide for the complete exclusion of others based on race.

(e) The Civil Rights statute, 42 U.S.C. 2000e-2(i) was not an issue in the District Court. Indeed, the intervenors had sought to amend their answer to raise that issue, but the District Court denied the application and in its order prohibited the injection of that issue (I 87 p. 237). Despite that disposition in the District Court, the issue was smuggled into the case through the intervenors' brief in the Court of Appeals. Despite the objection by the petitioners to that procedure, the Court of Appeals nevertheless considered that issue for the first time and used it as the mainstay of its decision, opinion 12a, last sentence.

2. The decision below failed to pass upon the free expression questions under the First Amendment and the Fourteenth

Amendment which were presented in the District Court and again argued in the Court of Appeals. In the complaint, the petitioners alleged the denial of their rights under the Fourteenth Amendment. In the Pretrial Order (I 28 page 2). "General Nature of Claims of Parties . . . The Museum's policy is especially suspect because it impinges upon First Amendment rights of Plaintiffs to commercial speech." It was also argued in the brief of plaintiff at the summary judgment motion (I 69 p. 1, 7). The District Court passed on that claim and held that the petitioners' right to expression were not abridged (I 98 p. 13, third line).

Petitioners argued in the Court of Appeals that this Court in *Linmark Associates Inc., etc., v. Township of Willingboro,* 431 U.S. 85 held that commercial speech in the form of sales signs on real property were protected as a form of expression. Since such expression may not be abridged, the petitioners have been discriminated against under the long line of cases beginning with *Niemotko v. Maryland* 340 U.S. 268 which have held that once public property is made available for public expression, it cannot be granted to one group but denied to another, especially on the basis of race. The Court of Appeals did not pass on the question (although the District Court had done so).

This question alone is a novel and important one, instinct as a recurring problem. It should be settled by the grant of review.

3. The decision below is inconsistent with this Court's interpretation of the Equal Protection Clause. The Court of Appeals erroneously held that because the petitioners are white persons, they are not stigmatized persons and therefore the protection of the Fourteenth Amendment's strict scrutiny of racial discrimination does not apply to a "white majority".

This is a question that is novel, important and recurring that begs for settlement, for what was said by the Court of Appeals is directly in conflict with the Fourteenth Amendment. The Fourteenth Amendment states in its applicable part:

> "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws".

It states "any person". Therefore, it applies to any person or to any race. It says nothing about a "stigmatized" "invidious" "minority." Where a person is excluded because of his race from the use of public property for expression, the full armor of the Fourteenth Amendment is called into play, including the strict scrutiny of the discriminatory policy in this case.

Strict scrutiny is necessary in this case, because the testimony of Ewing, the director of the Museum makes amply clear (and so does the District Court) that the purpose of excluding all persons, except Indians from the use of the Portal was to afford the Indians an opportunity to make sales and earn money from them. A strict scrutiny by this Court would reveal that the adoption of a stance of a "portal policy" by the Museum was conceived for the purpose of this litigation, to lend respectability and legal justification for its racial discrimination. Calling sales to earn money a "portal policy" of education and artistic interests is contrived. Sales by the petitioners could equally be called "educational", "artistic" or "cultural". So would sales of trinkets in front of the National Museum in Washington, D.C., or in front of the Metropolitan Museum of Art in New York. The plain fact is, as the Court of Appeals observed, that competition from the petitioners would interfere with the sales by the Indians and thus, the breaking of their monopoly would not enhance the promotion of their welfare. We question whether racial discrimination is warranted under the Constitution in order to foster a monopoly in the use of public property.

If the device adopted in this litigation to legitimate the conceded racial discrimination is countenanced by this Court, then a new technique for racial discrimination will have been introduced for endless exploitation.

The Museum in its brief in the Court of Appeals admitted that its discrimination is racial. It has made a bold attempt to cover up its discrimination with legitimacy. Since it is the creator of the discriminatory policy, its efforts come as no surprise, for mothers are notorious for translating the vices of their children into virtues.

But this Court, experienced in such matters, is alert to the shams used to conceal unconstitutional discriminations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

EMANUEL REDFIELD
67 Wall Street
New York, N.Y. 10005
Telephone: 212-422-1023
Counsel for Petitioners

August 1, 1979.

APPENDIX A—OPINION AND JUDGMENT OF COURT OF APPEALS (entered June 14, 1979).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1683

PAUL LIVINGSTON and SARA LIVINGSTON,
Plaintiffs-Appellants,

v.

GEORGE EWING, individually and as Director of the Museum of New Mexico; TIBO CHAVEZ, MRS. WALTER MAYER, NORRIS E. BRADBURY, FATHER BENEDICT QUESTA, LINDA DELGADO, FRANK BATEMAN, and TONY REYNA, all individually and as members of the Board of Regents of the Museum of Santa Fe; SAM PICK, individually and as Mayor of the City of Santa Fe; and RUDY MILLER, individually and as Chief of Police of the City of Santa Fe; and JOSEPH ALLOCCA, DORA BATTLE, BOB BERNARDINELLI, JIM A. CORIZ, JR., EDWARD GONZALES, LOUIS MONTANO, MICHAEL RUNNELS and ROBERT STUART, individually and as Council Members of the City of Santa Fe,

Defendants-Appellees,

and

DENNIS ANDERSON, et al.,
Intervenors-Appellees.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 77-192-M Civil)

Emanuel Redfield, 67 Wall Street, New York, New York, for Plaintiffs-Appellants.

Jill Z. Cooper, Assistant Attorney General (Toney Anaya, Attorney General, and Arthur J. Waskey, Assistant Attorney General, and Bob D. Barberousse, 320 Paseo de Peralta, Santa Fe, New Mexico on brief) for Defendants-Appellees.

Michael P. Gross and Solomon, Roth and Vanamberg, P.O. Box 1447, 40 Sena Plaza, Santa Fe, New Mexico, for Intervenors-Appellees.

L. Lamar Parrish of Ussery, Burciaga & Parrish, P.O. Box 487, Albuquerque, New Mexico, on brief for Amicus Curiae All Indian Pueblo Council, Inc.

Before McWILLIAMS and DOYLE, Circuit Judges, and MATSCH, District Judge.*

DOYLE, Circuit Judge.

The question for decision in the above case is whether the policy of the State of New Mexico and that of the City of Santa Fe, which permits the Indians to display and to sell their handcrafted jewelry, arts and crafts on the grounds of the Museum of New Mexico and the Palace of the Governors, and which prohibits any persons other than the Indians from offering for sale handcrafted jewelry and which specifically forbids sales by persons other than Indians within the Plaza, is valid.

Paul and Sara Livingston, the plaintiffs-appellants in this case, are non-Indians who seek to obtain a judgment authoriz-

ing them to sell jewelry in the area of the Museum and Palace of the Governors, which is assigned on an exclusive basis to the Indians.

On February 18, 1976, the Board of Regents of the New Mexico Museum at Santa Fe adopted a written policy providing for withdrawal of permission previously granted to display and sell merchandise on the grounds of the Museum with the exception of the area under the portal, which could be used solely by Indians to sell and display arts and crafts made by hand by Indian artists and craftsmen.

On April 2, 1976, the City of Santa Fe adopted a resolution prohibiting sales by persons other than Indians within 50 feet of any established business offering for sale handcrafted jewelry.

The disposition of this case was by way of an order granting the summary judgment motion of the Director of the Museum and that of the Board of Regents of the Museum of Santa Fe, together with the Mayor, the Chief of Police of Santa Fe, and the Council members of Santa Fe among others. The individual Indians have intervened. An amicus brief has been filed by the All Indian Pueblo Council, Inc.

There exists no issue between the parties as to the facts, and since the plaintiffs-appellants also moved for summary judgment, no dispute exists as to the propriety of disposing of this case on summary judgment. The question is whether the trial court's decision granting summary judgment in favor of defendants-appellees was correct.

The trial court's memorandum and order states the issue in terms of whether the policies of the Museum and of the City "permitting only Indians to sell their handmade goods under the portal of the Palace of the Governors violates the Equal

Protection Clause of the Fourteenth Amendment of the United States Constitution."

The trial court in describing the contentions has said that the plaintiffs maintain that their rights under the Fourteenth Amendment have been violated. The defendants claim that there exists a rational basis for the policy which gives a preference to the intervening Indians who are craftspeople. In essence, the trial court said that the design of the program is to "enhance the ability of a distinctive cultural community to maintain their self-determination and lifestyle."

The history of the building in question goes back to the seventeenth century. It is said to be the oldest public building in the United States. The Pueblo Indians actually occupied it between 1680 and 1693. During this period they sold food and wares on the site of the house. After the reconquest by the Spanish, the area became a marketplace, and subsequently traders and businessmen established shops there. During the nineteenth century, several ethnic groups used the portal as a market, but by 1909, the non-Indian groups had abandoned it; only the Indian market remained.

The New Mexico legislature established the Museum in 1909, and since then the Indians have been a part of the Museum's program. In the interest of stimulating the native crafts and encouraging the educational consequences, the Board of the Museum was carrying out an educational plicy to develop and preserve the traditions of New Mexico. In 1935, the Museum began to limit the space inside the portal to the Indians for the sale of their arts and crafts. An agreement was made between the Museum and the New Mexico Association of Indian Affairs to have a market under the portal. Although this market was discontinued during World War II, it was reestablished immediately thereafter and is now used during the entire year. Custom was changed to a more definite policy by the Regents in

1972. The Indians themselves allocate the space and maintain an orderly market. The program is not limited, however, to New Mexico Indians. It is used as well by Indians from other areas of the country. Disputes are resolved by the Director of the Museum.

The opinion of the trial court also emphasized that the Museum's effort has been to promote the traditional Indian arts and crafts and to prevent the influx of non-Indian substitutes and imitations. It is thought that only Indians can make Indian goods and, therefore, that it is in the public interest to allow the Indians to do it. The conclusion which the trial court reached is that it is permissible under the Constitution to promote a unique cultural effort such as the French Quarter in New Orleans and this Indian market in Santa Fe. It is pointed out that Indians are protected by Art. I, §8 of the Constitution, which grants to Congress exclusive power to regulate commerce with the Indian tribes. Likewise, the New Mexico Constitution, Art. 21, §2, affords protection to Indian tribes.

I
APPLICABILITY OF THE PREFERENCE STATUTE, 42 U.S.C. §2000e-2(i)

A. Consideration of the Supreme Court's Decision in Morton v. Mancari, 417 U.S. 535 (1974)

The leading United States Supreme Court decision on the subject of Indian preference is that in Morton v. Mancari, 417 U.S. 535 (1974), wherein a not dissimilar attack was made on preferential hiring of Indians within the Bureau of Indian Affairs. The argument was that this was a classification which was invidious. The Supreme Court, however, rejected this argument. The three-judge district court had held that the Indian preferences were impliedly repealed by §11 of the 1972 Equal Employment Opportunity Act. 42 U.S.C. §2000e-16(a). The

Supreme Court reversed. Its holding was that §12 of the Indian Reorganization Act of 1934, 25 U.S.C. §472, was not repealed, expressly or impliedly, by the Equal Employment Opportunity Act of 1972, which proscribed racial discrimination in federal employment.

The importance of the decision for our purpose is that the Supreme Court, in upholding the preference contained in the 1934 Act, placed it in perspective and recognized its object as being the giving of Indian tribes a greater degree of self-government both politically and economically. Congress, it was said, was seeking to modify a situation, whereby a non-Indian staffed agency exercised plenary control over the lives of the federally recognized Indian tribes. The overall purpose of the Act, it was pointed out, was to promote self-government within the tribes, and accomplishing these ends required the use of some degree of preference and exemption. The Court thus said, in effect, that the underlying purpose of the Act was to correct discrimination which had theretofore existed against the Indians.

Based upon this background, the Supreme Court rejected the contention of the appellees that there was a conflict between the Indian Reorganization Act of 1934 and Title VII of the Equal Employment Opportunity Act of 1972, which could be resolved only by holding that the 1972 Act impliedly repealed the 1934 exemptions. The opinion of Mr. Justice Blackmun was that the Congress had in the interim created exemptions excluding coverage of tribal employment and granting preferential treatment to a business or enterprise on or near a reservation in 42 U.S.C. §2000e(b) and §2000e-2(i). These were held to show a congressional intent that Indian preference in this context was not to be considered racial discrimination of the type generally proscribed. From the fact of the congressional intent expressed in the 1964 enactment not to repeal the preferences, it was held to be illogical to argue that there was an *implied* repudiation in

1972. Also pointed out was the fact that Congress passed at about this time two new Indian preference laws.[1]

The general conclusion of the Court was that the case turned on the unique legal status of Indians under federal law and upon the plenary power of Congress derived from a history of treaties and the assumption of guardian-ward status to legislate specially on behalf of Indian tribes. The long history of Indian preference legislation was said to be al a part of an effort by Congress to discharge its unique obligations to the Indians, which fully justified the legal preferences made.

In discussing the enactment of the 1964 preference provisions, 42 U.S.C. §2000e(b) and §2000e-2(i), as evidencing a congressional intent not to impliedly repeal exemptions, the Court said:

> These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

417 U.S. at 548.

The Supreme Court in *Mancari* also rejected the notion that the preference under attack in that case was in truth a preference. It called it an employment criterion. It said that Congress had sought only to authorize the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, directly or indirectly, affect the lives of tribal Indians. It said that the preference was granted to Indians not as a discrete racial group, but, rather, as tribal entities whose lives and activities are governed by the BIA in a unique fashion. It said also that no other group of people has such a status.

In our opinion the Supreme Court's decision in Morton v. Mancari, *supra,* is a very strong precedent for upholding the grant of the exclusive right to the Indians in the present case based on the employment statute in §2000e-2(i), which provides:

> (i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

The holding in *Mancari,* plus the background information which it provides, together with the Supreme Court's comments concerning the statute which we consider to be here applicable, provides strong support for the applicability of the statute to our facts.

B. Does the Relationship Between the Museum and the Indians Constitute an Employment Praactice?

It is urged by the Livingstons that the relationship between the Indians and the Museum does not constitute an employment practice within the meaning of §2000e-2(i). Therefore, they contend that the statute does not apply.

In a strict sense the Indians are not servants of the Museum in a master-servant sense. For one thing, they are not paid a salary. It is more accurate to say that they are given a valuable concession much of which has been, however, developed by the Indians over a long period of time. The Indians, in addition, render a valuable service to the Museum by bringing tourists to the Square. Also, their presence attracts tourists to the public buildings and to the private shops.

Employment practice must be given a broad scope. It is not restricted to a servant situation. To give it such a narrow effect would thwart the entire effort and not allow the Indians to develop as entrepreneurs, and it would place them in a position of having to compete with Anglo businessmen and employ competitive practices, and would tend to sacrifice the educational and cultural object. The fact is that they are engaged in employment and the fact is that the Museum is the Director of this employment, and there is every reason to regard this as an employment practice.

The District of Columbia Circuit in Sibley Mem. Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), extended the Title VII Act to a hospital which allowed private duty nurses to work on the premises. In that case the private duty nurse was employed by the patient and not the hospital, and yet the hospital was held responsible for the policy which allowed discrimination against male nurses. It thus extended the employment concept to a party, the hospital, which did not actually employ the complainant. *Id.* at 1341.

Similarly, the case of Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974), involved the granting of a concession by the Racing Association to driver trainers to work on its premises. It was held that the withholding of this concession on account of race violated the Act. It said that the

defendants were employers within the meaning of 42 U.S.C. §2000e(b) even though they did not pay the complainant who actually worked for a concessionaire.

C. Is the Portal Area on or Near a Reservation Within the Meaning of the Statute?

The wording of the Act, "on or near an Indian reservation" is fulfilled. Neither the particular area of the portal, as it is called, nor the City of Santa Fe, is on an Indian reservation. However, Santa Fe is said to be eight miles from an Indian pueblo and within a short distance of others, which include the ones from which the portal Indians come. The words "on or near a reservation" were specifically included in the Act so as to bring in Indians who had not been assimilated by nearby pueblos or tribes, but who maintain close ties with reservations in the community. So it would appear that the terms "on or near" were included in the Act in order to give some scope and breadth to the statute. We see no problem in applying the statute to the portal Indians. Their proximity to the reservations is sufficient so as to bring them within the protection of the exemption or preference statutes. *See* Morton v. Ruiz, 415 U.S. 199 (1974), which considers the term "on or near" in the context of welfare eligibility. The Court's interpretation was a liberal one.

II

In our opinion, the statute, 42 U.S.C. §2000e-2(i), which has received favorable comment from the Supreme Court in *Mancari,* is fully applicable here and is dispositive of this case. If, however, this case were being considered as a possible constitutional violation, a reverse discrimination, it would be our conclusion that no such violation has been demonstrated, for the following reasons:

First, the effort of the Livingstons to show reverse discrimination within the meaning of the University of California Regents v. Bakke, ____U.S.____, 57 L. Ed.2d 750, 98 S.Ct. 2733 (1978), fails. It is true that in *Bakke,* the Supreme Court, in the opinion of Justice Powell, applied the strict scrutiny test. Four Justices, however, rejected it because Bakke was not a member of a class that had any of the traditional aspects of a suspect group. Here, there was no facial, stigmatized discrimination against the white majority. Rather, the effort was to extend to the Indians privileges which they were peculiarly able to utilize in the promotion of educational and cultural objectives in which the state had a great interest.

Second, assuming that the burden is on the state to establish that the interest which it is advancing is a compelling one, we believe that the facts presented prove that there is a valuable state interest, that of acquiring, preserving and exhibiting historical, archeological and tehnological interests in fine arts. We would rule that the right claimed by the Livingstons is far outweighed by the educational, cultural and artistic interests which the state is fostering. If the Livingstons were to be granted relief and the condition were changed so as to create a general competitive condition, it would unquestionably render impossible the promotion and encouragement of the salutary objects which now obtain, that is, the education of the public in the history and tradition of the area as well as the promotion of Indian arts and crafts. Thus, even if the matter were measured in accordance with the opinion of Mr. Justice Powell in *Bakke, supra,* the policies which are being pursued by the State of New Mexico would withstand the constitutional test.

One further observation: The Livingstons cannot say that there is anything in the nature of stigma which attaches to the

classification, whereby the discrimination, if any, is invidious. Instead the permission given to the Indians is one element of a comprehensive program designed to allow the general public to meet the Indians and to gain information as to the character and quality of the Indians' work. We cannot agree that this effort constitutes invalid racial discrimination.

In conclusion, therefore, we hold that the Livingstons' case fails because Congress was fully justified in extending to the Indians the exemptions that are considered and favorably discussed in Morton v. Mancari, *supra.*

The judgment of the district court is affirmed.

APPENDIX B—MEMORANDUM OPINION AND ORDER (entered July 17, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

PAUL LIVINGSTON, et al.,

Plaintiffs,

v.

GEORGE EWING, et al.,

Defendants,

and

DENNIS ANDERSON, et al.,

Intervenors.

This action is before the Court on cross motions for summary judgment by plaintiffs Livingston and defendants Ewing and the Museum of New Mexico. These parties are in agreement and I find that there is no genuine issue of material fact; intervenors oppose the motions for summary judgment, but I find that, on the basis of the law, affidavits, exhibits, and testimony submitted with these motions, it is proper to grant summary judgment in favor of the defendants.

This case involves the question of whether the Museum of New Mexico's policy permitting only Indians to sell their hand-

made goods under the portal of the Palace of the Governors violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Plaintiffs argue that the policy violates the Fourteenth Amendment because it is an unjustified classification based upon race. Defendants claim that there is a rational basis for the policy, and that they may constitutionally give a preference to Indians. Intervenors are Indian craftspeople who sell their wares under the portal; they argue that the Museum may undertake programs which enhance the ability of distinct cultural communities to maintain their self-determination and lifestyle.

FACTS

In 1909, the New Mexico Legislature established the Museum of New Mexico, giving its Board of Regents the responsibility for managaement and control of the property and policy of the Museum. The historic Palace of the Governors in Santa Fe, the oldest public building in the United States, was placed under the control of the Regents for the use of the Museum. The portal is the patio portion of the Palace of the Governors and is thus under the control of the Regents. When the Museum was created, it was dedicated to the presentation and preservation of New Mexico's multi-cultural traditions.

The Palace of the Governors has historically been visited and used for various purposes by several cultural groups. The Pueblo Indians occupied the Palace after the Pueblo Revolt of 1680-1693, and subsequent to the Reconquest by the Spaniards, the Indians sought justice from the governors in disputes over land, water, and personal rights. In addition, the Indians travelled to the Palace to sell food and miscellaneous wares. The plaza area was used as a market place by both Hispanos and Pueblo Indians after the Spanish conquest; later, Anglo traders and businessmen established shops in the plaza. Sometime prior

to 1853, several ethnic groups began to use the portal as a public market place. By 1909, the non-Indian groups had largely abandoned the portal and only the Indian market remained.

The Museum's first director adopted a policy of incorporating the Pueblo Indians into the program of the Museum; they were encouraged to utilize its facilities to revitalize their native arts and crafts, for their own economic benefit, and for the benefit of the Pueblo communities as a whole. In addition, it was felt that by stimulating the native crafts, New Mexico's rich and diverse ethnic traditions would be highlighted and preserved. Finally, the presence on the Palace grounds of the Indians as they made and sold their crafts provided living educational exhibits, from which the public has benefited.

In 1935, the Museum began to permit only Indians to use the space in the portal for the sale of their arts and crafts. At that time, by agreement with the Museum, the New Mexico Association of Indian Affairs sponsored an Indian Market under the portal. It was discontinued during World War II but immediately thereafter the Museum permitted exclusive year-round use of the portal by the Indians. This practice has been in effect since that time, but was formalized as Museum policy by the Regents in 1972. In February, 1976, a written policy statement was issued to insure that no vendors would be allowed to sell on Museum property, except the Indians.[1] There is no dispute that the Museum policy grants a preference to Indians not afforded to non-Indians.

The Indians under the portal are charged with the responsibility of allocating the space, maintaining a fair and orderly market, and guaranteeing that the articles offered for sale are genuine Indian handmade goods. It is not the policy of the Regents to operate an open market: the portal is to be used for the Indian program or not at all.

The program is not limited to New Mexico Indians, although few Indians from other areas of the country use the portal to sell their crafts. If there is a dispute, the director of the Museum or a member of his staff checks with the BIA office or the area office at the Reservation to determine whether persons claiming to be Indians are members of Federally recognized Indian tribes or pueblos. Most of the Indians who sell their arts and crafts under the portal live within the Pueblos of New Mexico, maintain their own native culture and remain unassimilated into the predominant American culture. They primarily speak their native languages and maintain strong ties with the traditional religious and social customs of their people.

It is undisputed that the viability and economic well-being of the Pueblos depends significantly upon the income which is produced by the sale of hand-made goods under the portal. Thus, there is a direct link between the portal program and the self-determination of these Indians. If the market were to be opened to all vendors, the Indians would gradually retreat from or evacuate the Portal, fearing conflicts with the non-Indian vendors. Conflicts between the plaintiff, Paul Livingston, and one or two of the Indians selling under the Portal have already occurred. The eventual outcome would probably be that the Pueblo Indians would be largely dependent upon welfare instead of their own work, and the quality and production of traditional arts and crafts might suffer.

The plaintiffs have not established that their means of earning a livelihood is severely curtailed by the portal policy. They produce jewelry, some of which is fashioned after Indian designs. The Museum of New Mexico Foundation operates the Museum Shop in the Palace which accepts all kinds of art subject only to criteria for quality, authenticity, and the relationship of the art to the programs of the Museum. The plaintiffs can sell their handicrafts through various outlets, and have done

so in the past, although the Museum Shop has rejected it as being of inferior quality and lacking in authenticity. There have been complaints from tourists that they had purchased from non-Indians under the portal, what they believed to be Indian-made jewelry, which actually proved to be something other than authentic.

The exhibits in the Museum are selected on a cultural basis, with the emphasis placed upon authenticity and the special historical relationship, if any, that such exhibits might have with the Palace itself. Each exhibit displays a discrete New Mexican cultural or ethnic heritage; it is felt that co-mingling the cultures is less instructive because this fails to clarify the lines of historical development within each culture. The portal program is authentic in that it presents what remains of a traditional market: there is no dispute that the Indians are the only remaining, relatively unchanged craftsmen of the original group who sold their wares under the portal. The portal exhibit presents one aspect of the Indian culture and allows the public to interact with it, which the Museum views as a substantial benefit to the public.

The Museum of New Mexico must, by its very nature, be culturally selective. The inclusion or exclusion of various exhibits is based upon the director's and Regents' view of the best way to present and preserve the historical cultures of New Mexico. The policy of the Museum to allow only Indians to sell their hand-made crafts under the portal is the expression of a choice made by the Museum based upon cultural considerations. The Museum, through this policy, seeks to foster native Indian arts, give impetus to the communities from which these arts arise, educate the public, and protect a unique tradition from assimilation so as to maintain, as best they can, its purity. The Museum's choice, therefore, is for the type of cultural style known as "traditional Indian arts and crafts"; items falling within this group must, by definition, be made by Indians. This

was emphasized in one of the Intervenor's affidavits, and uncontroverted by the plaintiff:

> When we refer to ethnic arts we are not referring to a racial designation, but to a system of expressions shared by members of a self-identified cultural group that perceives itself and is perceived by others as having a unique esthetic tradition. While individual members of such groups usually have much latitude for creativity, the tradition itself defines the style and sets forth certain rules or approaches that distinguish it from other cultural groups. Indian and especially Southwestern Indian arts constitute a recognized ethnic artistic style . . . Affidavit of Barry Toelken.

Thus, the policy of permitting only Indians to sell their hand-made goods under the portal is the means by which the Museum's decision to present and preserve the Indian culture has been effectuated. The prohibition of sales on Museum property operates against everyone except Indians because only Indians can produce hand-made Indian goods, and the Museum has determined that the most benefit would be derived by the public if only Indians were permitted to sell the goods that they or other Indians make.

LAW

The fact that the Museum is culturally selective does not in itself violate the Fourteenth Amendment, *McGowen v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 293, 81 Sup. Ct. 1101 (1961) and Justice Douglas' dissenting *DeFunis v. Odegaard,* 416 U.S. 312, (1974). In *New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed. 2d 511, 96 Sup. Ct. 2513 (1976), the City Council's ordinance barring certain vendors from the historic French Quarter, was aimed at "enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans." p. 303. The Court stressed that it would defer to the

judgment of the City Council on questions of the economy of the city and the preservation of the charm and beauty of an historic area, unless the classification "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage." p. 303. In *Avins v. Rutgers,* 385 F.2d 151, (1967), cert. denied, 390 U.S. 920 (1968), the Third Circuit upheld the right of a law review editor to exercise judgment as to inclusion of articles in the publication, noting that there was no constitutional right to publish one's opinions wherever and whenever one pleased.

The inquiry therefore, must be into whether the Museum's cultural selectivity has been exercised in such a way as to infringe upon the plaintiffs' fundamental rights or to operate against the plaintiff or for the Indians on the basis of race. If so, then a strict standard of scrutiny must be applied to the policy's reasonableness; if not, the policy need only bear a rational relationship to a legitimate state interest. *Loving v. Virginia,* 388 U.S. 1, 18 L.Ed. 2d 1010, 87 Sup. Ct. 1817 (1967); *Morton v. Mancari,* 417 U.S. 535, 41 L.Ed. 2d 290, 94 Sup. Ct. 2474 (1974).

A. IS THE MUSEUM POLICY BASED ON RACIAL PREFERENCE?

The factual background of this case compels the conclusion that the Museum's policy excludes certain vendors on a cultural, not a racial basis. Several U.S. Supreme Court cases and a substantial body of federal law would also permit no other conclusion.

Because of their unique cultural, legal, and political status, Indians have consistently received special or preferential treatment, from the federal and state governments. This treatment has been challenged as being violative of equal protection; however, the U.S. Supreme Court has found that, because these

distinctions are not made on the basis of race, they need only be rationally related to a legitimate state interest, and the constitutional challenges have ultimately failed.

The Amicus brief details the historical and legal background that justifies the preferential treatment of Indians. Article I, Section 8 of the United States Constitution grants special status to Indians by giving Congress the exclusive power to regulate commerce with the Indian Tribes. Title 25, United States Code, is entirely concerned with Indians; the *New Mexico Constitution,* Article XXI, Section 2, protects Indian lands, and Sections 73-31-1 *et. seq.* establish a state agency to encourage the preservation and development of Indian arts and crafts. Title VII, 42 USC 20003-2(i) exempts Indians on or near reservations from the equal employment provisions of that Title. The list of special laws, and cases giving preferential treatment to Indians is considerable, and the justification for all of this lies in the appreciation of the uniqueness of Indian communities, their wish to maintain a separate way of life, and the benefit that the preservation of such will confer upon society.

In the landmark case of *Morton v. Mancari, supra,* the Court denied a constitutional atack upon the preference for hiring Indians within the Bureau of Indian Affairs. In finding that this preference was not an invidious classification based upon race, but was rather a political preference, the Court relied upon the historical relationship between the federal government and the Indian people, and upon their definition of the alleged "racial group":

> The preference is not directed towards a racial group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. Note 24, p. 553.

The holding in this case makes clear that in any equal protection analysis dealing with Indians, the historical, legal and cultural context must be considered in determining whether an Indian preference constitutes invidious racial discrimination.

The reasons for this approach are fairly obvious. Because the federal government and the State of New Mexico are committed to insure the political separateness and cultural survival of Indian tribes, and because Indians who live on or near a reservation are members of distinctive cultural communities which would be gradually destroyed if some protection were not given agaisnt forced assimilation, Indians have gained a unique status in the law which no other group, racial or otherwise, can claim. As a result, traditional equal protection analysis falls grossly short of dealing in a fair manner with the question of Indian preference, unless it takes these factors into account.

In the present case there simply are no material uncontroverted facts which would give rise to a conclusion that this is a racial classification. On the contrary, the facts indicate a cultural basis for the Museum's policy: the basic nature and purpose of the Museum to present and preserve historical cultures, not races; the Museum's desire to provide an opportunity which will foster Indian arts and crafts; the fact that only members of federally-recognized Indian tribes may sell under the portal; the fact that at any one time the Museum displays, inside the Palace, not just Indian culture, but other historical New Mexico cultures as well; and the special recognition given to the Indian cultures by the State of New Mexico in legislation designed to encourage traditional arts and crafts.

The requirement that the sellers of Indian hand-made goods be Indian does not make the Museum's preference one based upon race. It is the only logical way the Museum could

carry out its cultural selectivity and still serve the Museum's educational purposes. The Museum is not in the business of sponsoring an open market, and to maintain its own standards of authenticity and historical relevancy, the Museum could not allow for the sale of imitation crafts by non-indigenous craftsmen.

The Museum has argued that the plaintiffs are not members of a suspect class, or a discrete and insular minority, so that the standard of strict scrutiny should not be applied. This type of equal protection analysis in cases involving Indian preference is singularly inapplicable. It is obvious that the plaintiffs are not members of a suspect class: the policy operates to exclude everyone in the world except Indians. This type of analysis overlooks the complexities which *Mancari, supra,* deems essential to a fair analysis of this type of case. Thus, having determined that the preference here is not based upon race, it is not helpful to determine whether it operates against a suspect class. It does operate for the benefit of many people, Indian and non-Indian, without regard to race.

B. DOES THE MUSEUM POLICY INFRINGE UPON PLAINTIFFS' FUNDAMENTAL RIGHTS?

Even though the Museum's policy is not based on a racial classification, if it infringes upon one of the plaintiffs' fundamental rights, then the standard of strict scrutiny must be applied in the determination of the policy's reasonableness. It is clear that these must be rights which are guaranteed, implicitly or explicitly, by the U.S. Constitution, and plaintiffs have presented no evidence establishing such right. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed. 2d 16, 93 Sup. Ct. 1278 (1973). The plaintiffs' exclusion from the portal does not deprive them of their First Amendment rights to freedom of expression since these rights are not absolute and do not guarantee every individual the exact forum he or she desires. *Nebbia v. New York,* 291 U.S. 502, 78 L.Ed 440, 54 Sup. Ct. 505 (1974); *Avins v. Rutgers, supra; New Orleans v. Dukes, supra.* It would be absurd to hold that there is a fundamental right to be included in a Museum's programs under the circumstances of this case.

The conclusion must be, therefore, that there is no question of material fact and on the basis of the applicable law, the plaintiffs have failed to establish the violation of a fundamental right by the Museum's policy, and the result is that such policy will be upheld if it bears a rational relationship to a legitimate state interest.

C. IS THE MUSEUM'S POLICY RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST?

In *Morton v. Mancari, supra,* the Indian preference was found to be " . . . reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." at 303. The undisputed facts of this case meet the *Mancari* standard.

The state has several interests or goals which are being furthered by the Museum's portal policy. Foremost amongst them is the preservation and encouragement of traditional Indian arts and crafts. Equally important, however, is the survival of certain of the Pueblos as cultural and economic entities. Education by interaction with Indian people is certainly a fundamental goal of the Museum. In addition, the state has further interest of promoting tourist trade by preserving the charm and beauty of the portal area in a manner consistent with its history, and attempting to prohibit the sale of reproductions or copies of Indian goods to unsuspecting tourists.

There is not, nor can there be, any question about the legitimacy of these state interests. It is also clear that these goals are not racially based. The final question, then, is whether the policy of permitting only Indians to sell their wares under the portal is reasonably and directly related to these goals.

The existence of a rational relationship does not require the Indians to have been the only people to have sold goods under the portal during the centuries of its use as a market. It is undisputed that the portal and the Palace of the Governors has a multi-cultural history, but the Indians were an integral part of that history and are the only remaining traditional craftsmen. New Mexico is fortunate to have living purveyors of the ancient cultures of this country, and is using this "natural resource" to benefit the Indians as well as the general public.

The possibility that there are other means of accomplishing the above-mentioned legitimate state interests does not indicate the lack of a rational relationship between such state interests and the Museum policy. The policy need not be set aside if any state of facts reasonably may be conceived to justify it. It is doubtful that opening up the market to all types of vendors and craftsmen would promote the goals of the Museum as well as the present policy does. On the contrary, it is likely that the abandonment of the portal by the Indians if other craftsmen were to be permitted access would serve to accomplish the opposite of the Museum's goals of fostering traditional Indian arts and crafts, and economic well being of the Indian people.

In *Mancari, supra,* the preference was approved because it bore a rational relationship to the goal of Indian self-government and determination. The uncontroverted facts in this case show a direct link between the portal policy and the economic survival of several pueblos. Indian self-determination

is meaningless if opportunities for self-support are destroyed. Therefore, it is clear that the policy is intimately and directly related to this one very legitimate, racially neutral state interest. If, as *Mancari* holds, such an interest is legitimate, and a preference for Indians is constitutional for the federal government through the BIA, then the same must be true of a state government through one of its state-owned museums. *Bolling v. Sharpe,* 437 U.S. 497 (1954).

I therefore conclude that the Museum's policy in this case does not violate the plaintiffs' rights to equal protection under the Fourteenth Amendment; Now, Therefore,

IT IS ORDERED that the plaintiffs' motion for summary judgment is denied, and the defendants' motion for summary judgment is granted.

s/E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX "C"
42 U.S.C. Section 2000e-2(i)

Preferential Treatment to Indians Living on or near a Reservation. Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation, with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

APPENDIX "D"

WHEREAS, the presence of Indian artists and craftsmen at the Palace of the Governors has been an integral part of the history, tradition, and function of the Museum of New Mexico for many years; and

WHEREAS, the Civil Rights Acts of 1964 and 1972, enacted by the Congress of the United States and upheld by the Supreme Court of the United States have clearly re-enforced the policy of preferential treatment for Indians employed in Indian-related industries on or near Indian Reservations;

NOW, THEREFORE, BE IT RESOLVED BY THE REGENTS OF THE MUSEUM OF NEW MEXICO that policy of the Museum with respect to the display and sale of merchandise on the grounds and areas of the Museum shall be as follows:

1. Other than during annually scheduled markets, no person nor group of persons will be permitted to display or sell merchandise on the grounds belonging to the Museum of New Mexico with the sole exception that the area directly under the portal in front of the Palace of the Governors

may be used by Indians to display and sell arts and crafts produced by hand by Indian artists and craftsmen.

2. Permission to use the area under the portal is granted to the Indians with the express understanding that the Indians themselves are solely responsible for the fair and orderly regulation of the use of that space. In the event that the Indians fail to maintain a fair and orderly market under the portal, the Regents will withdraw the permission granted herein and no display or sale of goods whatsoever will be permitted on any of the grounds belonging to the Museum.

3. The Museum hereby withdraws all permissions heretofore granted to display or sell any merchandise on any other grounds belonging to the Museum.

4. The Director of the Museum shall have the authority to request the assistance of municipal law enforcement officers to enforce the policy set forth herein.

5. This statement of policy supercedes all previous statements of policy concerning the display and sale of merchandise on the grounds of the Museum of New Mexico.

APPENDIX "E"
POLICY ON SALES ON MUSEUM GROUNDS

The official policy concerning merchandise sales and other commercial activities, as adopted by the Board of Regents of the Museum of New Mexico, February 18, 1976 reads in part as follows:

1. Other than during annually scheduled markets, no person nor group of persons will be permitted to display or sell merchandise on the grounds belonging to the Museum of New Mexico with the sole exception that the area under the portal in front of the Palace of the Governors may be used by Indians to display and sell arts and crafts produced by hand by Indian artists and craftmen.

2. Permission to use the area under the portal is granted to the Indians with the express understanding that

the Indians themselves are solely responsible for the fair and orderly regulation of the use of that space. In the event that the Indians fail to maintain a fair and orderly market under the portal, the Regents will withdraw the permission granted herein and no display or sale of goods whatsoever will be permitted on any of the grounds belonging to the Museum.

3. The Museum hereby withdraws all permissions heretofore granted to display or sell any merchandise on any other grounds belonging to the Museum.

4. The Director of the Museum shall have the authority to request the assistance of municipal law-enforcement officers to enforce the policy set forth herein.

5. This statement of policy precedes all previous statement of policy concerning the display and sale of merchandise on the grounds of the Museum of New Mexico.

George H. Ewing, Director
MUSEUM OF NEW MEXICO

February 24, 1976

APPENDIX "F"
RESOLUTION NO. 1975-23

A POLICY ESTABLISHING REGULATIONS AND PROCEDURES FOR SPECIAL USES OF PUBLIC STREETS AND PARKS

WHEREAS, the City of Santa Fe is charged with the responsibility for maintaining public parks and thoroughfares, and for regulating their use in the public interest; and

WHEREAS, the City of Santa Fe receives certain special requests for use of public parks and thoroughfares;

THEREFORE BE IT RESOLVED that the policy for granting special requests for the use of public parks and thoroughfares shall be as follows:

* * *

4. Street vendors:

—Permit for sales activity on public streets may be approved by the City Manager, provided that:

(a) Use of no parking zones, loading zones, and metered parking spaces shall be prohibited beyond the allowable parking time in that space.

(b) Vendors shall not be permitted to locate adjacent to City parks during events scheduled by the Cityi of Santa Fe Recreation Department, or on the Plaza during scheduled annual events.

(c) Loudspeakers and other undue noise such as yelling shall be prohibited.

(d) Sales shall be prohibited within 500 feet of any established business offering for sale the type of wares of-

fered by the street vendor.

(e) In any calendar year, no more than five (5) vendors selling food or drink items and five (5) vendors selling non-food or drink items shall be permitted.

(f) Other than in conjunction with the Plaza uses in Section 5 below, no street vendors shall be permitted on the Plaza.

Procedures and requirements

—Submit letter of request, with name, address, and phone number of applicant, stating type of wares to be offered, type of vehicle or sales display, and location or route to be followed.

—Submit State Tax number, City occupation license number, and EIA Food and Drink permit if necessary.

—Submit proof of liability insurance and $100.00 clean-up deposit to be released by the City Parks and Recreation Director upon inspection of the premises.

—Submit annual permit fee of $300.00. This fee is mandatory for requests to sell on the Plaza, but may be waived for cause by the City Manager for requests to sell at other locations.

—Applicants for street vendor permits must show proof of residency in the City of Santa Fe for no less than 12 months prior to date of application

* * *

Appeals: Any decision by the City Manager may be appealed to the City Council within 30 days of that decision.

Note: Parking of motorized vehicles on grass shall be prohibited, unless authorized by the City Council.

The sales or consumption of alcoholic beverages on public property shall be prohibited in conjunction with any request authorized under these reguations, unless specifically authorized by the the City Council.

ADOPTED THIS 14th DAY OF MAY, 1975.

s/Sam Pick
Mayor Pro Tem

s/Bonnie Lopez
CITY CLERK